

APPENDIX

Supreme Court, U. S.

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Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-5283

JAMES A. JACKSON,

Petitioner,

—v.—

COMMONWEALTH OF VIRGINIA

AND

R. ZAHRADNICK, Warden,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 25, 1978
CERTIORARI GRANTED DECEMBER 4, 1978

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

June 18, 1976—Petitioner's original petition filed in the United States District Court for the Eastern District of Virginia.

June 29, 1976—Respondent's motion to dismiss filed.

July 7, 1976—Petitioner's rebuttal to the motion to dismiss filed.

October 1, 1976—Order entered granting the writ of habeas corpus with a Memorandum filed at the same time.

November 1, 1976—Respondent's notice of appeal filed.

August 3, 1978—Opinion and judgment of the United States Court of Appeals for the Fourth Circuit.

JAMES A. JACKSON
Name

106332
Prison Number

VIRGINIA STATE PENITENTIARY
Place of Confinement

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA

Case No. 76-0270-R

JAMES A. JACKSON, PETITIONER

vs.

R. ZAHRADNICK, WARDEN
Superintendent, Jailor, or authorized person
having custody of petitioner, RESPONDENT

and

ANDREW P. MILLER
The Attorney General of the
State of Virginia, ADDITIONAL RESPONDENT

(If petitioner is attacking a judgment which imposed a sentence to be served in the *future*, petitioner must fill in the name of the state where the judgment was entered. If petitioner has a sentence to be served in the future under a federal judgment which he wishes to attack, he should file a motion under 28 U.S.C. § 2255, in the federal court which entered the judgment.)

PETITION—Filed June 18, 1976

1. Name and location of court which entered the judgment of conviction under attack Corporation Court, County of Chesterfield, Chesterfield, Virginia
2. Date of judgment of conviction 27 March 1975

3. Length of sentence Thirty (30) years
4. Nature of offense involved (all counts) Murder, 1st. Degree—1 Count
5. What was your plea? (check one)
 - a. Not guilty (X) b. Guilty ()
 - c. Nolo contendere ()

If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, give details:
N/A
6. Kind of trial (check one)
 - a. Jury () b. Judge only (X)
7. Did you testify at the trial? Yes () No (X)
8. Did you appeal from the judgment of conviction
Yes () No (X)
9. If you did appeal, answer the following:
 - a. Name of court Supreme Court of Virginia, Richmond, Virginia
 - b. Result Denied 10 February 1976
 - c. Date of result 10 February 1976
10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions with respect to this judgment in any court, state or federal?
Yes () No (X)
11. If you answer to 10 was "yes", give the following information
 - a. (1) Name of Court N/A
 - (2) Nature of proceeding N/A
 - (3) Grounds raised N/A
 - (4) Did you receive an evidentiary hearing on your petition, application or motion? YES () NO () N/A

- (5) Result N/A
- (6) Date of result N/A
- b. As to any second petition, application or motion, give the same information:
- (1) Name of court N/A
- (2) Nature of proceeding N/A
- (3) Grounds raised N/A
- (4) Did you receive an evidentiary hearing on your petition, application or motion? Yes () No () N/A
- (5) Result N/A
- (6) Date of result N/A
- c. As to any third person, application or motion, give the same information:
- (1) Name of court N/A
- (2) Nature of proceeding N/A
- (3) Grounds raised N/A
- (4) Did you receive an evidentiary hearing on your petition, application or motion? Yes () No () N/A
- (5) Result N/A
- (6) Date of result N/A
- d. Did you appeal to the highest state court having jurisdiction the result of action taken on any petition, application or motion?
- (1) First petition, etc. Yes () No () N/A
- (2) Second petition, etc. Yes () No () N/A
- (3) Third petition, etc. Yes () No () N/A

- e. If you did not appeal from the adverse action on any petition, application or motion, explain briefly why you did not
N/A
12. State *concisely* every ground on which you claim that you are being held unlawfully. Summarize *briefly* the facts supporting each ground. If necessary, you may attach pages stating additional grounds and facts supporting same.
- CAUTION: In order to proceed in the federal court, you must first exhaust your state court remedies as to each ground on which you request action by the federal court. If you fail to set forth all grounds in this petition, you may be barred from presenting additional grounds at a later date.
- A. Ground one: *The indictment failed to show that the killing and murder was charged to be done with Malice Aforethought, which*

Supporting *FACTS* (tell your story briefly without citing cases or law):

is indispensable. The Commonwealth felt only that a 2nd. Murder Degree was warranted and so states (TR-112). The elements of murder, either 1st. or 2nd. Degree Murder, were not proved and in particular, Malice Aforethought or premeditation.

- B. Ground two: *Violation of Constitutional Rights in respect to Fifth, Sixth and Fourteenth Amendments*

Supporting *FACTS* (tell your story briefly without citing cases or law):

Interrogated by police after stating wish to remain silent. Impartiality of presiding judge by interference in trial. Interrogation without having seen counsel. Use of concealed tape recorder without knowledge of accused.

- C. Ground three: *Conviction contrary to fact and law and not supported by evidence that Malice or premeditation present.*

Supporting *FACTS* (tell your story briefly without citing cases or law):

Evidence showed crime was of passion since testimony of Deputy Sheriff indicated high alcoholic state, both parties in possession of weapons and planning to engage in a sexual act after departing area

- D. Ground four: *Failure of police to both safeguard his rights and to produce evidence in support of his case.*

Supporting *FACTS* (tell your story briefly without citing cases or law):

Police continued interrogation after Accused wished to remain silent, used tape-recorder, coercion, excessive delay in transporting him back to Virginia, and failure to obtain bullets allegedly fired in self-defense and warning to deceased.

FOR YOUR INFORMATION, the following is a list of the most frequently raised grounds for relief in habeas corpus proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise any grounds which you may have other than those listed if you have exhausted your state court remedies with respect to them. *However, you should raise in this petition all available grounds* (relating to this conviction) on which you base your allegations that you are being held in custody unlawfully.

- a. Denial of effective assistance of counsel.
- b. Denial of right of appeal.
- c. Conviction obtained by plea of guilty which was unlawfully induced or entered.
- d. Conviction obtained by use of coerced confession.

- e. Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure.
- f. Conviction obtained by use of evidence obtained pursuant to an unlawful arrest.
- g. Conviction obtained by a violation of the privilege against self-incrimination.

APPENDED SHEET

GROUND E. BIAS and Interference by the Presiding judge during the trial.

Support = The presiding judge himself raised the charge to Murder in the 1st. Degree over the Commonwealth and did become personally involved in the case to the degree of making caustic remarks to Defense Counsel regarding photographs of Deceased, alleged mutilation directly aimed at the Accused, failure to release copies of said photographs when requested although he, the presiding judge released copies of the Medical Examiners Reports, denial of a Show Cause Order petition regarding the photographs.

GROUND F. Conviction obtained by use of coerced and illegal statement obtained by police officers by means of a concealed tape-recorder in motor vehicle while being transported from North Carolina to Virginia, a trip that took excessively long to complete to the extent of eight (8) hours approximately.

Support = The police officers did take approximately eight hours to transport Accused to Virginia in a motor vehicle and did interrogate him and promise to help him in his case to prove that a charge of murder was not warranted, which is coercion, since he had signed a statement in North Carolina

he did not wish to sign the Warning of Rights in front of witnesses and did ask for counsel to advise him while in North Carolina, which was denied.

GROUND G. Conviction was obtained through violation of the privilege of self-incrimination.

Support = A statement introduced into the court record and recorded on a tape-recorder concealed in the front seat area of the transporting vehicle unbeknown to Accused who was without counsel was used to his detriment and did place him in jeopardy. Further, after being introduced into evidence, a statement that Accused did fire several shots into the ground between himself and Deceased as a warning after Deceased advanced upon him with the intent to attack him with a butcher knife, and police officers did fail to submit evidence, by means of the spent projectiles, that Accused had indeed fired those warning shots.

GROUND H. Police Officers did fail to produce all evidence available.

Support = The police officers did produce spent cartridges found at the scene of the crime, but did fail to find and produce the spent projectiles claimed to be fired by Accused. The function of the police is to present all evidence of the case regardless whether favorable to prosecution or defense, yet this was not done which therefore hindered the defense and denied evidence vital to them.

GROUND I. Issue by the presiding judge over the number of gunshots.

Support = Enraged and drunk grappling with Accused for gun is unpredictable.

h. Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.

i. Conviction obtained by a violation of the protection against double jeopardy.

j. Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impanelled.

13. If any of the grounds listed in 12A, B, C and D were not previously presented in any other court, state or federal, state *briefly* what grounds were not so presented, and give your reasons for not presenting them:

Grounds A, B and D, plus those of appended sheet—Counsel did not raise these issues even when directed to do so in either trial or on direct appeal to Supreme Court.

14. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack Yes () No (X)

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:

a. At preliminary hearing Mack T. Daniel 4401 Old Hundred Road, Chester, Virginia 23831

b. At arraignment and plea Same as A.

c. At trial Same as A.

d. At sentencing Same as A.

e. On appeal Same as A.

f. In any post-conviction proceeding N/A

g. On appeal from any adverse ruling in a post-conviction proceeding N/A

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time?

Yes () No (X)

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?

Yes () No (X)

- a. If so, give name and location of court which imposed sentence to be served in the future:

N/A

- b. And give date and length of sentence to be served in the future

N/A

- c. Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future?

Yes () No ()

WHEREFORE, petitioner prays that the Court grant petitioner relief to which he may be entitled in this proceeding.

Executed at Richmond, Virginia on 1 June, 1976.

/s/ James Jackson
Signature of Petitioner

FORMA PAUPERIS AFFIDAVIT

(See instructions at beginning of this form).

I hereby apply for leave to proceed with this petition for writ of habeas corpus without prepayment of fees or costs or giving security therefor. In support of my application, I state under oath that the following facts are true:

1. I am the petitioner in said petition, and I believe that I am entitled to redress.
2. I am unable to prepay the costs of said action, or give security therefor, because I have no tangible property or other items of value.
3. I have no assets or funds which could be used to prepay the fees or costs except 37 cents (Write "None" above if you have nothing, otherwise, list your assets.)

/s/ James Jackson
Signature of Petitioner

(Sign only if you seek to proceed without prepayment of fees and costs)

STATE OF VIRGINIA
COUNTY (CITY) OF RICHMOND

I, JAMES A. JACKSON #106332, being first duly sworn under oath, presents that he has read and subscribed to the above and states that the information therein is true and correct.

/s/ James Jackson
Signature of Petitioner
(Required as to each petitioner)

Subscribed and sworn to before me this 4th day of June, 1976.

/s/ Oscar Hardison
Notary Public or other person
authorized to administer an oath

My Commission Expires September 20, 1977.

CERTIFICATE

I hereby certify that the petitioner herein has the sum of \$37 cents on account to his credit at the penal institution where he is confined. I further certify that petitioner likewise has the following securities to his credit according to the records of said penal institution:

/s/ Lt. Oscar Hardison
Authorized Officer of
Penal Institution

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

Civil Action No. 76-0270-R

JAMES A. JACKSON, PETITIONER

v.

COMMONWEALTH OF VIRGINIA, RESPONDENT

MOTION TO DISMISS—Filed June 29, 1976

Now comes the Respondent, by counsel, and moves this Court to dismiss the Petition for a Writ of Habeas Corpus. In support of said Motion, Respondent states as follows:

1. Petitioner is being detained pursuant to a conviction in the Circuit Court of the County of Chesterfield of August 21, 1975, wherein the Petitioner was convicted of first degree murder and sentenced to a term of 30 years.

2. Petitioner is attacking the validity of the afore-said conviction and alleges as follows:

- (a) That the indictment was defective because it did not allege that the crime was committed with malice aforethought.
- (b) That the evidence was insufficient to show premeditation or malice aforethought.
- (c) That his confession was involuntary.
- (d) That not all the evidence was introduced against him that was available.

3. As to said allegations, Petitioner has failed to exhaust his available State remedies. (Exhibit A, attached).

4. As to said allegations, Petitioner is not entitled to relief in any event.

5. As to the allegation of the Petitioner that the indictment failed to allege malice aforethought, the indictment was in conformity with § 19.2-221, Code of Virginia (1950), as amended. Moreover, the commission of the words, "malice aforethought", is not fatally defective. *Coleman v. Smyth*, 166 F.Supp. 934 (E.D. Va. 1958).

6. As to the allegation of Petitioner that the evidence was insufficient for conviction, Petitioner is entitled to relief only if the record is totally devoid of evidentiary support. *Williams v. Peyton*, 414 F.2d 776 (4th Cir. 1969). Such is not the case here. The weapon used in the commission of the crime, the apparent viciousness with which it was carried out, the opportunity to withdraw, possession of the weapon long prior to the commission of the crime, the number of shots fired in the commission of the crime, and the opportunity for premeditation, clearly were enough evidence upon which to base a finding of guilt. Although there was some evidence of intoxication, the Petitioner, himself, by his own admission, clearly understood what he was doing. (Tr. 89).

7. As to the allegation of Petitioner that his confession was involuntary, the evidence clearly demonstrates that Petitioner's confession was not involuntary. He was advised of his constitutional rights. (Tr. 86). The Petitioner stated that he understood them. (Tr. 86). Prior to making the confession, the Petitioner was again advised of his rights. (Tr. 88-89). No objection was made to introduction of the confession. Having raised no objection, he would not be entitled to relief. *Estelle v. Williams*, No. 74-676, and *Francis v. Henderson*, No. 74-5808, both decided by the Supreme Court of the United States on May 3, 1976.

8. As to the allegation of Petitioner that there was not introduced all available evidence against him, there is no constitutional right to have all evidence available introduced against a defendant.

9. Respondent denies each allegation in the Petition which has not been expressly admitted.

10. Respondent further states that these allegations may be fully determined upon a review of the records, and without the necessity of a plenary hearing.

11. Respondent states that arrangements are being made to have transmitted to this Court the original records of Petitioner's conviction.

WHEREFORE, the Respondent prays that this Court review this Motion to Dismiss and thereafter deny and dismiss the Petition.

COMMONWEALTH OF VIRGINIA

By _____
Counsel

Linwood T. Wells, Jr.
Assistant Attorney General
900 Fidelity Building
Richmond, Virginia 23219

[Certificate of Service Omitted in Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

Case Number 76-0270-R

JAMES A. JACKSON, PETITIONER

v.

COMMONWEALTH OF VIRGINIA, RESPONDENT

REBUTTAL TO MOTION TO DISMISS—

Filed July 7, 1976

Now comes the Petitioner before this Honorable Court, without counsel to advise him, and does hereby render his rebuttal to the Commonwealth.

Petitioner contends that Paragraph #1 is correct as per court records.

Petitioner contends that the contentions of the Commonwealth are correct with the exception of Item D, which he will attack further on in the document.

Petitioner contends that he has exhausted his State Remedies in that following his conviction in a circuit court, he duly appealed its decision to the Supreme Court of Virginia and has carried the process of law into the Federal Courts, therefore he is entitled to file accordingly.

Petitioner is entitled to relief if a wrong does exist and such is the case before the bar.

Petitioner states that malice aforethought was not present in the indictment, the warrant or other document presented him, nor did the Commonwealth feel that a charge of First Degree Murder was warranted as evidenced by the transcript.

Petitioner states that the Commonwealth must prove conclusively that malice did in fact exist and that the elements of First degree murder were in fact present, which it did not do.

Petitioner states there is indeed issue to be taken regarding the advising of his Constitutional Rights and

Commonwealth has failed to dislodge the contentions that same were grossly violated.

Petitioner states that all evidence was not obtained and presented to the Court and that same was in fact detrimental to his case and that his counsel did not raise the issue despite his request for same to be raised.

Petitioner states that many of his contentions are not contained within the records of the Court and he will present them and does ask the Commonwealth to explain to the Court how the contentions occurred.

Petitioner moves this Court to dismiss the motion of the Commonwealth.

Petitioner states that the indictment must clearly charge that the killing was done with malice aforethought and that same is indispensable to the indictment. *Commonwealth v. Gibson*, 2 Va Cas (4 Va) 70. Further, Malice aforethought is the grand criterion that distinguishes murder from other killings as evidenced by the *M'Whirt's Case* 3 Gratt (44Va) 594. Therefore, without malice, there can be no murder. *Coleman v. Commonwealth*, 184 Va. 197, 35 S.E. (2d.) 96. The test of murder is malice and the Commonwealth failed to prove that there was any malice considered toward the deceased by the accused. The Commonwealth failed to show that the accused made any hostile or otherwise intentional intent to harm the deceased with the exception that evidence was introduced showing that parties involved were heavily under the influence of alcoholic beverages, that sexual activities were planned and in the course of those sexual activities under intoxicated conditions, violence arose not of a planned nature. Malice, either express or implied, is an essential element of either first or second degree murder and the Commonwealth failed to prove malice present. *Richardson v. Commonwealth*, 128 Va 691, 104 S.E. 788; *Mercer v. Commonwealth*, 150 Va. 588, 142 S.E. 369.

The Commonwealth has clearly established that deceased voluntarily picked up the accused at the residence and they went to the public area where they were observed by Deputy Sheriff David Andrews and Officer Buckner (TR-64). Further, no evidence was presented by the

Deputy's statements that any hostility existed, only intoxication and both possessing weapons (TR-66 to 69). Witnesses Curtis and Sally Cole did not state that any hostility or other contrary behavior existed prior to the killing nor was any present when deceased picked up the accused in her car on the eve of the killing. The only dissention testified to was their own feelings regarding their mother and the accused, plus their relationship.

There is no law against a person having a target practicing session nor is there one stating that a person cannot fire a pistol nor carry one with the exception of being concealed. The accused was engaged in target practice prior to the deceased coming into contact with him and Witness Cole stated he fired the pistol with him at targets. This was verified by Witness Salley Cole, his wife. Clearly no hostility was present or they would have interfered when their mother offered him a ride in her car. Further, they would have been in fear themselves if hostility existed and the Commonwealth failed to present any evidence hostility or malice existed.

Deputy Sheriff Andrews stated that he observed them both in an intoxicated condition, he saw and examined the pistol, he was told by the deceased of the knife and he saw the knife in the car and described it as a butcher knife. Yet in spite of all this, he failed to take action because of personal feelings and again, the lack of hostility or malice being evident. He failed to do his duty as evidenced by the chain of events and perhaps the deceased may be alive today if he had not let personal feelings intervene, but the matter here is that he saw no positive reason to arrest or otherwise take into custody either one or both parties because of malice or hostility.

The Commonwealth stated in its motion that the accused is not afforded the Constitutional right to have all available evidence introduced, however, he is contending that evidence favorable to the accused is also not allowed. In the tape presented in written form to the court, accused stated that he fired into the ground attempting to prevent the deceased from stabbing him with the knife. (TR-90) Further the detectives asked him if he were

willing to show them where he fired the warning shots into the ground. (TR-93) He stated that he would show them and stated that there were six shots fired in warning. However, the police failed to produce any evidence regarding these slugs nor did they state that they attempted to locate them. The function of the police is to gather all evidence, not that evidence that is to be used to prosecute with only. The police here were only too willing to obtain evidence to convict him, but not evidence that would help him or reduce the severity of the crime. This is constitutional denial of evidence pertinent to the defense. Further, accused stated that he did not take items of deceased and that they were in the car, therefore, since the deceased was out of the car, the knife would have been present near the body or in the general area but again no mention is made of the knife yet testimony puts the deceased in the possession of a knife as stated by Deputy Andrews. Vital evidence pertinent to the defense has been allowed to disappear or was not used or not introduced in court and this was detrimental to the accused.

Commonwealth in Paragraph Six states that apparent viciousness existed, but he used the word apparent since the Commonwealth could not prove that malice existed. In addition, he refers to the weapon long before the commission of the crime, but the accused was in a lawful pursuit when in engaged in target practice with Curtis Cole. Again no malice existed or Curtis Cole would have disarmed the accused and failing in that, would have notified the police that accused was acting in a hostile manner and was in possession of a weapon; ie: a pistol. This did not occur. Commonwealth again refers to the number of shots fired in attempt to increase the severity of the act, yet he does not state that several were fired in warning to prevent serious injury when the deceased attacked the accused with the knife. Further, he states that there was some evidence of intoxication, when in fact there was considerable evidence showing great intoxication was in fact present from Curtis and Sally Cole, Deputy Andrews, the accused and the autopsy report on the deceased. The Commonwealth states that he

knew what he, the accused, was doing or that he was intoxicated (TR-89) when in fact it shows nothing of the sort.

Commonwealth states that accused was advised of his Constitutional rights and to this accused agrees, however, the paper containing these rights was not signed by the accused. The entry in the signature area was made by a detective. Further, accused did not want to make a statement and asked for counsel while still in Fayetteville, North Carolina, but same was not provided for him. By asking for counsel and not wishing to make a statement, the detectives were not privileged to continue any form of interrogation of the accused until he had been provided counsel and had consulted with him. As can be clearly seen, the interrogation did not stop and subtle and soft interrogation tactics were used to get him to talk, not know that a tape recorder was being utilized on the front seat recording everything he said and that it would be used in a court of law. The accused was incustodial interrogation status from the moment he entered the car to be transported to Virginia, that he would be unable to have counsel to advise him and that he would be completely at the mercy of the interrogating officers during the trip from Fayetteville, North Carolina to Petersburg, Virginia.

In respect to the tape, it is procedure that the interrogating officers identify themselves, the person they are interrogating and to begin the interrogation and the taping by again warning the accused of his rights. The tape heard in court and the written text from the tape do not show this entry whatsoever. It starts out without any warning or statement that the conversation is being recorded and that the accused is voluntarily making the statement recorded of his own free will and knowledge. Therefore the credibility of the tape and its use as presenting evidence willingly given, is highly doubtful and its color should in fact be carefully considered in light of certain elements which taint its value as evidence.

The Commonwealth is asked specifically why the trip from Fayetteville, North Carolina to Petersburg, Virginia took almost eight (8) hours? Since the entire

state of North Carolina can be traversed in three (3) hours and another hour to Petersburg, why an additional four (4) hours involved? Further, since the route of travel was made on Interstate #95, there would be no delays since there are adequate lanes of travel on this highway. Additionally, the highway would not have to be left since adequate gassing facilities exist on or quite near the highway. It is quite clear that the police officers transported their prisoner at a slow rate of speed in order to subject him to a continual and subtle interrogation without the benefit of counsel and to prevent the accused from obtaining counsel while they were in the process of breaking down any objections and resistance the accused might have had. This is clearly continuing the interrogation and after the accused has specifically stated that he did not wish to make a statement, that he wished to have counsel and he refused to sign the paper in respect to his constitutional rights. Petitioner contends that this was clearly a violation of the Miranda Rule established in *Miranda v. Arizona* which prohibits same. The use of the tape recorder without the accused being aware of same concealed on the front seat and used without his knowledge is a clear violation of his constitutional rights under the Fifth Amendment which prohibits same.

Petitioner wishes here to state that he completed only the fifth grade in school and that he is sorely lacking in education and must rely on others to prepare his legal documentation for this Court. Further, his lack of education is very apparent and attempts to confuse or the use of subtle influence is readily workable. In this capacity without counsel to advise him, the detectives by delaying their arrival in Petersburg, Virginia were more than able to coerce a statement from the accused by their use of subtle interrogation and their promises to aid him in not being prosecuted on a charge of murder. Petitioner realized that he would have to face some sort of punishment for the death of the deceased that occurred while both were greatly intoxicated and involving sexual activity and would have readily plead guilty to a charge of manslaughter, however, he feels that a charge of

murder is not warranted in as he exercised no malice toward the deceased and the elements were not proven to warrant a conviction on a charge of murder and that his constitutional rights were so violated.

The deceased and the accused arrived at the church which was the death scene only after an altercation outside the diner. The deceased herself came back to the accused to make amends and offer him a ride. In this area, accused stated that he made a telephone call for a cab, but the police officers did not state whether they had checked into the veracity of this statement. Had they checked into this statement, this would have given the accused extra strength in reducing the severity of the act in as much as he attempted to depart the scene of the diner without the deceased. Again, the police saw fit only to gather evidence that would convict the accused and completely negate any mitigating evidence that would aid the accused in his defense.

The death scene was in an isolated place that was reached by the deceased driving her car and bringing the accused with her. Here we have a situation where two people are or were contemplating sexual activity at one point and a change of mood occurred. The entire nature of the situation is sorely aggravated by both parties being heavily under the influence of alcohol and heated words evolved, perhaps a slur on the sexual qualities or capacity of the deceased. Even the accused cannot remember exactly what ignited the chain of events, but he stated that she wished to engage in sexual relations and he did not. Deceased in taking offense with this attacked him with a knife and he attempted to dissuade her by firing the shots into the ground, a total of six bullets, while the deceased was attempting to reach and strike him with the knife. While reloading the weapon, he states that she threw the knife on the ground and then she attacked him physically trying to obtain possession of the pistol. In the struggle for the weapon, the weapon discharged twice. The first shot had to strike the deceased in the breast, since the struggle continued since the gun was discharged a second time. The wound in the breast would only infuriate due to the rage and

intoxication that had existed prior to and during the struggle as evidenced by the knife attack. The wound through the body was the death wound. Clearly the act occurred under the heat of passion and not through malice.

The presiding Judge Gates became impartial in reviewing the photographs of the deceased and especially the face of the deceased. He stated the evidence of mutilation when in fact the mutilation was the result of insects and rodents as recorded by the autopsy report. This unfair and unjust accusation resulted in His Honor losing his impartiality in the case and His Honor himself increased the act from Second to First Degree murder over the protests of the Commonwealth (TR-112 to 116) His Honor became biased at some point during the trial and this became evident at the trial's conclusion. It is more than possible that His Honor knew the deceased through the jail or some inspection of the jail, but the duty of a trial judge is to remain impartial and to hear the evidence submitted to the bar and analyze the material and render a verdict. By losing his impartiality and becoming biased, his judgment was affected and prejudice arose. Further, His Honor released all documentation regarding the case except the picture that had inflamed him, even in the face of a Show Cause order followed by a Writ of Mandamus which is pending. This cast considerable doubt on the impartiality of His Honor even at this date and stage of the case as to prohibit certain evidence and allow other evidence and documentation to be released to the accused knowing that the accused would file a Habeas Corpus.

Further, the term of Malice Aforethought does imply that a mind is under the sway of reason, whereas, passion, while it does not imply a dethronement of reason, yet it is the furor brevis which renders a man deaf to the voice of reason so that, although the act done was intentional of death, it was not the result of malignity of heart, but imputable to human infirmity. Passion and malice are, therefore, inconsistent motive powers and, hence, an act which proceeds from the one cannot

also proceed from the other. *Brown v. Commonwealth*, 86 Va. 466, 10 S.E. 745.

Petitioner contends that his Constitutional Rights were violated by the investigating police officers, that he was subjected to subtle coercion by the use of his lack of education, that a tape recorder was utilized without his knowledge or consent, that the act occurred while in a high state of intoxication, that malice did not in fact exist in any form and therefore he has been unjustly punished in regards to impartiality of the Honorable Judge Gates and the severity of the sentence.

Petitioner asks that a hearing be given him before his peers and with the advice of counsel to assist him to expound and expand the contentions and allegations within this petition and due to his lack of education to fully understand the entire legal process since his attorney coached him during the appearances in circuit court to compensate for his lack of understanding and education, and does hereby request that This Honorable Court please appoint him an attorney to assist him in his case.

Whereas, Petitioner moves this Court to discount the Motion to Dismiss by the Commonwealth and to hear his case with proper counsel and trial or hearing with a jury of his peers if the Court should decide to hear the case or to dismiss the charge forthwith based on the Constitutional violations, failure of the police to introduce all evidence and the impartiality of Judge Gates, and such other relief as the Court may deem fit and proper.

/s/ Jackson James
Signature of Petitioner

[Jurat Omitted in Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

Civil Action 76-0270-R
76-0267-R

Magistrate No.: 76-0106-L

JAMES A. JACKSON

v.

R. ZAHRADNICK, Warden, et al.

MEMORANDUM—Filed October 1, 1976

Petitioner, a State prisoner, filed this petition for a Writ of Habeas Corpus on 18 June 1976, attacking his conviction for first degree murder. He alleged that the indictment upon which he was tried was faulty in that it failed to allege "malice aforethought." He also alleged that his confession was involuntary and that the Commonwealth failed to produce evidence in his favor. However, because he has failed to exhaust his State remedies on those issues, the Court will not consider them at this time. *Slayton v. Smith*, 404 U.S. 53 (1971).

Of more importance is the allegation that there was a complete lack of evidence to show premeditation which was required for a conviction of murder in the first degree. While it is true that petitioner is entitled to relief only if the record is totally devoid of evidentiary support, see *Williams v. Peyton*, 414 F.2d 776 (4th Cir. 1969), the Court is of the opinion that such is the case here with respect to premeditation.

A review of the transcript of the proceedings in the Circuit Court shows that petitioner and the victim had been drinking on the day of the homicide. They visited a restaurant in Chesterfield County where they met a deputy sheriff who testified that petitioner was so drunk that he would not let him drive. There was no evidence

that petitioner displayed antagonism toward the victim at that time and, in fact, the deputy testified that when she was leaving, the victim "smiled" and "just laughed" when petitioner intimated that they might engage in sexual activity. Apparently, the deputy was the last person to see the victim alive or to see the petitioner until his arrest in North Carolina.

Petitioner made a statement to the arresting officers to the effect that the victim became belligerent towards him when he refused to have sex with her. Petitioner stated that the victim became so angry that she started at him with a butcher knife. He then fired six shots from a revolver he was carrying into the ground in front of her, but she kept coming. He reloaded the pistol, a scuffle ensued, and the weapon discharged. (Only once according to petitioner's statement although the autopsy showed that two bullets struck the victim.) Thereafter petitioner fled to North Carolina. Although he stated he was not drunk at the time of the incident, all of the evidence is to the contrary.

Black and white photographs of the crime scene were introduced into evidence showing the victim lying face down in a church parking lot. A color photograph was also introduced showing a close-up of the victim after she had been turned face up. In addition, an autopsy report was introduced which made no mention of any bruises or lacerations other than one over the posterior scalp. The autopsy report mentioned numerous abrasions caused by rodents and insects. The lab report indicated that the victim had been shot at close range. (Approximately $\frac{1}{2}$ inch).

At the close of the case, the attorney for the Commonwealth argued for a second degree murder conviction stating that because of the drinking he did not feel first degree murder had been proved. The trial judge thereupon referred to the color photograph and found "malice" from the "bruises" on the body and the gunshot wounds. There is no evidence that the discolorations depicted in the color photograph on the body of the victim are bruises. The autopsy report noted that the body had begun to decompose but it makes no mention

of any contusions except at the bullet entrance and exit sites. The mere fact that the victim was shot is not evidence of premeditation.

Under State law murder in the first degree requires that the killing be deliberate, willful, premeditated and with malice aforethought. See e.g. *Painter v. Commonwealth*, 210 VA 360, 171 SE 2nd 166 (1969). Since the Court has concluded that the record is totally devoid of any evidence of premeditation, the petitioner will be granted a Writ of Habeas Corpus with leave to the Commonwealth to retry him within sixty days from the date hereof.

An appropriate order shall issue.

/s/ [Illegible]

United States District Judge

Date: 1 October 1976

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

Civil Action 76-0270-R
76-0267-R

Magistrate No.: 76-0106-L

JAMES A. JACKSON

v.

R. ZAHRADNICK, Warden, et al.

ORDER—Filed October 1, 1976

In accordance with the memorandum this day filed, and deeming it just and proper so to do, it is hereby ADJUDGED and ORDERED that a Writ of Habeas Corpus shall issue, with leave to the Commonwealth to retain petitioner and to retry him at a trial to commence within sixty (60) days from the entry of this order, otherwise to release him from custody under the sentence imposed.

Let the Clerk send a copy of this order, along with the memorandum, to the petitioner and to the Attorney General of Virginia.

/s/ [Illegible]
United States District Judge

Date: 1 October 1976

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

Civil Action No. 76-0270-R
76-0267-R

Magistrate No. 76-0106-L

JAMES A. JACKSON, PETITIONER

v.

R. ZAHRADNICK, Warden, et al., RESPONDENTS

NOTICE OF APPEAL—Filed November 1, 1976

Notice is hereby given that Respondents hereby appeal to the United States Court of Appeals for the Fourth Circuit from the final order of this Court entered in this action on October 1, 1976.

R. ZAHRADNICK, Warden, et al.
By /s/ R. Zahradnick
Counsel

Linwood T. Wells, Jr.
Assistant Attorney General
900 Fidelity Building
Richmond, Virginia 23219

[Certificate of Service Omitted in Printing]

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 77-1205

JAMES A. JACKSON, APPELLEE

versus

COMMONWEALTH OF VIRGINIA, AND R. ZAHRADNICK,
Warden; ANTHONY F. TROY, Attorney General of
Virginia, APPELLANTS

Appeal from the United States District Court for the
Eastern District of Virginia, at Richmond. D. Dortch
Warriner, District Judge.

Argued October 3, 1977

Decided: August 3, 1978

Before HAYNESWORTH, Chief Judge, WINTER and
WIDENER, Circuit Judges

Linwood T. Wells, Jr., Assistant Attorney General (An-
thony F. Troy, Attorney General of Virginia on brief)
for Appellant; Carolyn J. Colville (Tracy Dunham, Col-
ville and Dunham on brief) for Appellee.

PER CURIAM:

The district court granted habeas relief to this state
prisoner on the ground that his state court conviction
of first degree murder was unsupported by any evidence
of premeditation. The district court recognized the rule

that the due process question does not require an ap-
praisal of the sufficiency of the testimony to support a
finding of guilt beyond all reasonable doubt, but that the
answer turns upon the presence or absence of "some"
evidence to support each element of the offense. The
district court concluded there was no evidence to support
a finding of premeditation. We take a different view
of the facts and reverse.

Jackson had met the victim, Mrs. Cole, when he was
confined in a local jail in Virginia and she was a cook
in the jail's kitchen. When he was released from jail,
she befriended him. Indeed, there were indications that
she wished him to move into her home with her, but
Jackson arranged to move into the home of her son,
Curtis Cole.

Late in the afternoon of the day of the homicide, Mrs.
Cole drove her automobile to the home of her son, and
Jackson went out of the house to join her in her car.
Apparently, the two talked of a trip to North Carolina,
for they called Curtis Cole out of the house to ask him
if he would go, too. He declined, and indicated that his
mother then changed her mind. Curtis Cole left the two
talking in the car, and Mrs. Cole called to him shortly
to say that she and Jackson were going to a diner.

Both Jackson and Mrs. Cole had been drinking, and
Jackson had a .38 caliber revolver with which he had
been engaged in target practice earlier in the afternoon.
There was a butcher knife belonging to Mrs. Cole on the
front seat, but everything seemed amicable between
them.

While seated in the diner, they encountered a deputy
sheriff who observed the revolver that Jackson was wear-
ing and the fact that he seemed too much under the
influence of whiskey to be driving. The deputy asked
to be given possession of the revolver until Jackson was
sober. Mrs. Cole told him of the butcher knife on the
front seat of her car, but insisted that they were "going
straight home," and the deputy contented himself with
hastening their departure without taking possession of
either the revolver or the knife. As they parted, Jack-
son told the deputy that he and Mrs. Cole were planning

some sexual activity, provoking giggles from Mrs. Cole. According to a statement given by Jackson to police and admitted in evidence at the trial, before driving away from the diner Mrs. Cole told Jackson that she wanted to have sex with him. Jackson said that he refused, whereupon Mrs. Cole attempted to stab him with her knife, saying that if she could not have him no other woman would. Jackson said he pushed her away and hit her on the back of the head with the butt of the revolver. The autopsy report showed a small laceration on the back of her head.

Jackson said he then left the car, crossed the street and called for a taxicab. While waiting for the cab, Mrs. Cole drove up and persuaded him to reenter her car. She then drove to a quiet, secluded church yard. There, according to Jackson, the two began "messaging around," and the clothing from the lower portions of Mrs. Cole's body was removed. Standing outside the automobile, according to Jackson, Mrs. Cole again sought sexual relations, and upon Jackson's declination, she again undertook to attack him with the butcher knife. To warn her away, Jackson said that he fired his revolver into the ground six times, emptying it. He then said that he broke the revolver open, emptying the six shell casings on the ground, which police officers later found, and reloaded his revolver. He said that when the revolver was reloaded, Mrs. Cole sought to wrest the pistol from him, and that during the scuffle the pistol accidentally discharged, killing Mrs. Cole.

Jackson then fled in her car to Fayetteville, North Carolina, leaving Mrs. Cole where she lay, her slacks beneath her body. A young woman attempted to sell Mrs. Cole's automobile, and Jackson went to Florida. Upon his return from Florida to Fayetteville, he was arrested because of the attempted disposition of the automobile. His statement to the policemen was made as he was being transported from Fayetteville, North Carolina back to Chesterfield County, Virginia.

If the trier of fact was bound to accept Jackson's statement of an accidental discharge of the revolver as the two struggled for possession of it, there would be no

basis for a finding of premeditation on his part. Jackson's story is full of internal inconsistency, however. According to his statement, Mrs. Cole stood idly by with a butcher knife in her hand as Jackson ejected the empty shell casings and reloaded his revolver. Only then did she drop the butcher knife and attempt to seize the gun. More significantly, perhaps, she was shot not once but twice. One bullet passed through her left breast from left to right, while the fatal bullet passed through her left chest and back, the spent bullet lodging itself in the interior of Mrs. Cole's automobile. That a single shot might have been fired accidentally may be believable, but that a second was fired accidentally after Mrs. Cole had already been struck once is incredible.

While premeditation is an essential element of the offense of first degree murder, the rule in Virginia is that it need not exist for an appreciable period of time. The requirement is met if the necessary intention exists immediately before the fatal blow is struck.¹ The fact that Jackson reloaded his revolver, the fact that he was so unthreatened by Mrs. Cole that he had sufficient time within which to do it, and the fact that she was shot twice together constitute some evidence of an intention on his part to shoot her.

In Virginia, extreme intoxication may suffice to negate premeditation. There was evidence that Jackson had much to drink, as had Mrs. Cole, but the trier of fact was warranted in finding that Jackson was not so intoxicated as to negate premeditation. The deputy sheriff at the diner thought that Jackson had had too much to drive an automobile, but he did not think Mrs. Cole so intoxicated. Nor did he think Jackson so drunk that he should not be allowed to leave in possession of his weapon.

Whether the judge, to whom the case was tried without a jury, was warranted in finding that there was premeditation beyond a reasonable doubt, we need not

¹ *Hairston v. Commonwealth*, 217 Va. 429, 230 S.E.2d 626 (1975); *Akers v. Commonwealth*, 216 Va. 40, 216 S.E.2d 28 (1975); *Shiflett v. Commonwealth*, 143 Va. 609, 130 S.E. 777 (1925).

consider.² One Justice of the Supreme Court has suggested that the rule of *Thompson v. City of Louisville*, establishing the rule that a federal court in a habeas proceeding must deny the writ if, in the state court trial, there was "some" evidence to prove each element of the offense, is too narrow in light of *In re: Winship*, 397 U.S. 358 (1970). See the opinion of Mr. Justice Stewart dissenting from denial of certiorari in *Freeman v. Zahradnick*, 429 U.S. 1111 (1977). Without greater indication that a majority of the members of the Supreme Court are prepared to extend *Thompson v. City of Louisville*, however, we are bound by it and do not consider whether the evidence was enough for the finder of fact to find premeditation beyond all reasonable doubt.

Jackson also attempts to attack the finding of guilt of first degree murder on the basis of an indication that the trial judge may have misapprehended the evidence.

Before the body of Mrs. Cole was found, decomposition had begun. A photograph of her body showed the presence of abrasions on portions of her body, but the autopsy report, also in evidence, clearly attributed them to rodents and insects. The judge referred to this photograph shortly before finding Jackson guilty of murder in the first degree and to the fact that she had been shot through her left breast as well as through her body. It is by no means clear, however, that the judge found or really thought that the abrasions shown in the photograph or the shot through the breast or both proved mutilation of the body by Jackson. Even if it was clear that the finding of premeditation was based in part upon erroneous inferences from some pieces of evidence, the

² *Thompson v. City of Louisville*, 362 U.S. 199 (1960); *Williams v. Peyton*, 414 F.2d 776 (4th Cir. 1969). Accord: *Freeman v. Slayton*, 550 F.2d 909 (4th Cir. 1976), cert. denied sub nom. *Freeman v. Zahradnick*, 429 U.S. 1111 (1977); *Holloway v. Cox*, 437 F.2d 412 (4th Cir. 1971); *Young v. Boles*, 343 F.2d 136 (4th Cir. 1965); *Faust v. North Carolina*, 307 F.2d 869 (4th Cir. 1962); *Grundler v. North Carolina*, 283 F.2d 798 (4th Cir. 1960).

writ shall not be granted as long as there is some evidence to support the ultimate finding of premeditation.³

Complaint is also made of the trial judge's consideration of the evidence of intoxication. There was, however, a basis for a finding that Jackson was not so intoxicated as to negate a finding of premeditation, and we have no power to reconsider the bits and pieces of evidence upon which he based his ultimate finding.

Since we conclude that there was no deprivation of any due process right in the finding of guilt of murder in the first degree, we conclude that the district court erroneously ordered the writ to be issued.

This proceeding was begun with a *pro se* petition which raised a number of questions, some of which were not considered in the district court and are not now considered by us, for, as to them, there has been no exhaustion of state court remedies.

REVERSED.

³ There is no possible way to review a jury's fact-finding processes. Here, there is only a suggestion that the judge may have been partially misled in his fact-finding process.

IN THE CIRCUIT COURT OF THE
COUNTY OF CHESTERFIELD

COMMONWEALTH OF VIRGINIA

v.

JAMES A. JACKSON

TRANSCRIPT OF PROCEEDINGS—March 27, 1975

TESTIMONY OF GLORIA FARMER

[9] *GLORIA FARMER*, introduced on behalf of the Commonwealth, having been previously duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. RUDY:

- Q. State your name and address?
A. Gloria Farmer and I am a waitress.
Q. Where do you work?
A. Chesterfield County Diner.

* * *

[10] Q. Were you related to the deceased in this case, Mary Houston Cole?

- A. Yes, I was.
Q. What relationship were you to her?
A. Daughter.

* * *

Q. Now, directing your attention to the 24th day of August, 1974, I believe that was a Saturday, will you tell the court if you had an occasion to see your mother on that day?

A. Yes, I did.

Q. What were the circumstances under which you saw her?

A. Well, I was there when she got home [11] from work.

Q. You were at her house?

A. Yes, I was.

* * *

[12] Q. What happened when she got home?

A. Well, she came in and she asked me if I was going to the grocery store and I told her, I just didn't feel like, I didn't want to go. And as far as I remember she, my sister-in-law had called while we were there and asked something about canning some snaps or something. I think she decided that she was going to the grocery store but not A&P. She was going to By-Rite.

* * *

Q. Now, did she leave the house?

A. Yes, to go to the grocery store.

Q. Did she return?

A. Yes.

Q. How much later after that did she return?

[13] A. She was gone about an hour or an hour and a half maybe.

Q. When she returned did she have any groceries with her?

A. Yes.

Q. What happened after that when she returned?

A. She got the food put away and she started fixing supper. She asked me if I, I don't know, she had a telephone call before she started. No, she started fixing supper and had a telephone call.

Q. Did you hear any telephone calls?

A. No, I didn't pay that much attention.

Q. All right now, would you state whether or not during this time she had anything to drink?

A. She—I think she was drinking a beer. She brought a six pack back from the store.

Q. She brought a six pack from the store?

A. Yes.

Q. Now, you said she started cooking supper and then what did you do?

A. I watched the supper while she took a bath.

Q. Did she take a bath or go into the bathroom?

[14] A. Yes.

Q. Did she take anything in the bathroom with her?
 A. She took the beer with her.

* * *

Q. All right now, prior to this time, which is the 24th of August, when was the approximate time [15] that you had seen this man? The first time?

A. Right after he got out of jail. And they went over and down and picked him up and brought him out to mother's.

Q. Who went over to town to pick him up?

A. My husband and my brother and mama.

Q. Your mother?

A. Yes.

Q. Whose idea was it to go to town to pick him up, do you know?

A. I don't know. They called out and she called, I believe he called out there if—

Q. He called to your mother's?

A. Yes.

Q. And somebody went to pick him up from somewhere, is that right?

A. Right.

Q. That was approximately how long before this day?

A. I can't say for sure.

Q. Well, two weeks or a month or thirty days or just give us an approximation?

A. It had been more than thirty days.

Q. A little more than thirty days?

A. Yes.

[16] Q. Much more than thirty days?

A. I can't say exactly because right after he got out of jail—

Q. —okay. So whenever he got out of jail that's when they went and picked him up?

A. Yeah.

Q. Did you see him when they got back from picking him up?

A. Yes.

Q. Did they come—where did you see him?

A. They came back to my mother's house.

Q. To your mother's house?

A. Yes.

Q. That would have been he and your mother and sister and—

A. No.

Q. Your brother-in-law?

A. No.

Q. Or your brother—

A. And my husband.

Q. Well, what happened when they came back?

A. Well, they came back and she came over and tried to introduce him and I said I didn't want to meet him and I wanted to go home.

[17] Q. Did you go home?

A. No.

Q. What did you do?

A. They had something to drink and they were all drinking then.

Q. Does that mean you had a little something?

A. No, I didn't drink nothing, nothing.

Q. What happened then?

A. They were all just in the house then.

Q. Did you stay there?

A. Till a little later on that evening then we left.

Q. Was that the first time that you had ever seen this man, is that right?

A. Right.

Q. Now, did you see him subsequent to that time? After that time?

A. I seen him a couple of time up in the yard.

Q. Up in whose yard?

A. Mother's yard and once when I went down to my sister's they were coming in in a truck.

Q. You saw him a couple of times in your mother's yard and once in your sister's yard?

[18] A. Yes, and one of my, at my brother's. Once there.

* * *

[20] CROSS-EXAMINATION

BY MR. DANIELS:

Q. Mrs. Farmer, what was your mother's condition when she first arrived?

A. From work?

Q. Yes?

A. She was just like she always was, she had not drank nothing. She was just tired.

Q. Then she went to the store?

A. Yes, about a half hour after she got home.

Q. What was her condition when she got back, had she been drinking anything?

A. No, she didn't open up a beer until she [21] got back home.

Q. When she left and said she might be going to North Carolina how many beers had she consumed?

A. I think maybe two or three cans.

Q. Did she take any with her that you know of?

A. I do not remember whether she took it or, I don't remember whether she took it or left it. For a fact I don't remember.

* * *

TESTIMONY OF SALLY COLE

[25] *SALLY COLE*, introduced on behalf of the Commonwealth, having been previously duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. RUDY:

Q. Mrs. Cole, will you state your full name and where you live?

A. Sally Mae Cole. I live at 6301 Newby's Bridge Road.

* * *

Q. Are you related to the deceased Mary Houston Cole?

A. Daughter-in-law.

Q. You're married to her son?

A. Yes.

* * *

[32]

BY MR. RUDY:

Q. Now, directing your attention to the day, to the last day that you saw your mother-in-law, describe to the court if you will, what happened at your house that day relative to this defendant and relative to your mother-in-law?

A. She, I saw her come up in the yard and—

Q. What time was this?

A. It was about five-thirty or six o'clock.

Q. Five-thirty or six?

A. Yes.

Q. Now, had you been home with this defendant James A. Jackson, earlier that day?

A. Yes, sir.

Q. What had you all been doing?

A. Nothing, no more than what I always do, clean up.

Q. Well, do you know whether or not he had a pistol?

A. Yes, sir.

Q. Do you know whether or not he fired [33] that pistol on that day?

A. Pistol—um—the children said that he fired it while—

* * *

BY MR. RUDY:

Q. Did you ever see him?

A. He did fire it after I came back from the grocery store.

Q. Did you see him fire it?

A. I was in the kitchen and my husband and him were out there shooting.

Q. You could see them from the kitchen?

A. Yes.

Q. You saw them shooting, what were they shooting at if you remember?

A. They were standing on the back porch shooting down at some bottles. They had a bottle or bottles sitting up down on this tree stump.

Q. Ma'am?

A. They had some bottles and cans and something sitting on a tree stump.

Q. Now, had James Jackson been drinking or [34] your husband drinking that day?

A. Yes.

Q. How much would you say James Jackson had been drinking?

A. I don't know but he had been drinking a lot.

Q. He had been drinking a lot?

A. Um-hum.

Q. Do you know whether he was drinking out of one of the bottles or several bottles?

A. He had several bottles and I don't know if he drank just one or several. I know he was drinking.

Q. How long? When had he started drinking on that day?

A. That morning.

Q. He started drinking that morning?

A. Um-hum.

Q. Yes?

A. Yes.

Q. Was your husband home most of the time on Saturdays or on this particular Saturday?

A. Yes, he was home all day except when he went to the grocery store.

Q. He and this defendant were together most of the time?

[35] A. Except when he went to the grocery store with me.

Q. Your husband went to the grocery store with you?

A. Yes.

Q. When did he do this shooting, was it the morning or afternoon or when was it done?

A. In the afternoon.

Q. How long before your mother-in-law came?

A. It was a good while before they came over.

Q. A good while?

A. Yes.

Q. It would have been early afternoon, would that be a fair statement?

A. Yes.

Q. To your knowledge had anybody else ever shot a pistol over there?

A. No, sir.

* * *

[36] Q. Now, do you know whether this defendant had had any conversation with your mother-in-law on that particular day?

A. All I know is that he had seen her up at the Bi-Rite supermarket.

MR. DANIELS: Objection.

BY MR. RUDY:

Q. How do you know that?

A. He told me.

Q. He told you he had seen her at the Bi-Rite?

A. Yes.

Q. When would that have been Sally?

A. I would say a couple of hours before she came over.

[37] Q. Did you see him leaving to go to the Bi-Rite or did you know that he was going?

A. Yes.

Q. Did he go with anybody?

A. My husband took him up there.

Q. And he told you he had seen your mother-in-law at the Bi-Rite?

A. Yes, sir.

Q. Now, when he came back from the Bi-Rite did he have—why did he go to the Bi-Rite, do you know or did he say why he was going up there?

A. To get some beer.

Q. Get beer?

A. Yes.

- Q. Did he have some beer when he came back?
 A. Yes.
 Q. How many beers did he have?
 A. A couple of, two six packs.
 Q. Two six packs?
 A. Yes.
 Q. Now, then the next thing you recall was when your mother-in-law came over there, is that correct?
 A. Yes, sir.
 Q. Describe to the court what happened next?
 [38] A. He went out of the house and got in the car with her and she never did come in the house. And they sat out there in the car for a long time and then they left and she said she was going to the store. She said she'd be right back.
 Q. They left in the car?
 A. Yes, sir.
 Q. Were you there when she and he were having this conversation or were you going about your business elsewhere?
 A. I was still in the kitchen but I was watching them.
 Q. You were watching them but you could not hear?
 A. I heard her when she said she was going to the store and she had, she talked to my husband.
 Q. Do you know whether or not your mother-in-law had anything to drink with her at that time?
 A. With her?
 Q. Yes? Your mother-in-law?
 A. I seen a beer can sitting up on the dash of the car but I don't know if she was drinking out of it or not.
 Q. Now, describe your mother-in-law's [39] actions and the defendant's actions when they left? Did they leave together in her car?
 A. Yes, sir.
 Q. Was she driving?
 A. Yes, sir.
 Q. Did you hear any argument between them at all prior to that time?
 A. No.

- Q. You did not?
 A. No, sir.
 Q. Then they left?
 A. Um-hum. Yeah.
 Q. Was that the last time you saw her?
 A. Yes.
 Q. What time was that, approximately?
 A. She left a little after seven when they left from over there.

* * *

TESTIMONY OF CURTIS COLE
 DIRECT EXAMINATION

[47]

BY MR. RUDY:

- Q. Curtis, state your name and occupation and where you live?
 A. Curtis Cole, Curtis William Cole. I was working as a bricklayer and I live at my father's now.

* * *

- [52] Q. Directing your attention to this day, the last time you saw your mother which was a Saturday I believe—

- A. —Yes.
 Q. Did you spend some time with this defendant that day?
 A. Yes.
 Q. Tell the judge what you all did that day?
 A. Well, he got me to carry him to the store and I carried him to the Bi-Rite.
 Q. That was in the afternoon?
 A. Yes, sir.
 Q. How about earlier that day?
 [53] A. No, I was outside cutting grass.
 Q. How much grass do you have to cut Curtis?
 A. Well, between the grass and the weeds and the bushes I was cutting—
 Q. Would you say an acre?
 A. A right good yard, cleaning up too.
 Q. Now, did he have his pistol?
 A. Yes.

Q. Would you recognize the pistol if you saw it again?

A. Yes, sir.

Q. How could you recognize it?

A. Yes, sir.

Q. How could you recognize it?

A. I know it if I seen it.

Q. I show you this pistol here and ask if you have seen it or if that's the pistol that looks familiar to you? Does it? (Handing the witness a pistol)

A. Yes, sir.

Q. Now, what are you looking at or by looking at it what would make you think that it looks familiar?

A. The way it opens up right there.

Q. All right. Did you ever have an occasion to use that pistol?

A. Yes, I shot it.

Q. When did you shoot it Curtis?

[54] A. I don't know what day that was.

MR. RUDY: I'd introduce the pistol as Commonwealth's Exhibit 1.

THE COURT: It will be received by the court as Commonwealth's Exhibit 1.

NOTE: Commonwealth's Exhibit Number 1 is entered into evidence.

WITNESS COLE: I shot it the night he brought it home.

BY MR. RUDY:

Q. Did you shoot it any this day that was the last day you saw your mother, do you remember taking target practice and shooting it any?

A. No, sir. I did not shoot it that day.

Q. Was he shooting it?

A. My wife said he was shooting it.

Q. You did not see him shoot it?

A. No, sir.

Q. When did you all shoot it together, did you shoot it together with him?

A. Yes.

Q. When would you all shoot it together or where were you when you shot it?

A. We shot it at some bottles, either shooting at a bottle or a tree.

[55] Q. Did he have that gun with him when he came there to stay?

A. No, sir.

Q. When did he bring it there?

A. He left and went and he said he went to North Carolina.

Q. Okay, he came back from North Carolina sometime before this day that we're talking about?

A. The day of the murder?

Q. Yes?

A. Yes, sir.

Q. So you knew that he had the gun?

A. Yes, sir.

Q. On the day that you were cutting grass and the day that this alleged offense occurred?

A. Yes, sir.

Q. How much time did you spend with the defendant?

A. About thirty minutes I reckon. We were going to the store and back.

Q. Whose idea was it to go to the store?

A. He got me to carry him up there so he could get some beer.

Q. Had he been drinking that day?

[56] A. Yes, sir.

Q. Now, would you describe his condition and how he was?

A. He was pretty well loaded.

Q. Intoxicated?

A. Yes, sir.

Q. He had been drinking a lot?

A. (The witness shaking his head affirmatively)

Q. Why did he ask you to take him to the store?

A. Just to get some beer is all he said.

Q. Did you take him up there?

A. Yes.

Q. Did he see your mother up there?

A. Yes, sir. He saw her.

- Q. Did you see the defendant with her?
 A. Yes, sir.
 Q. Did you hear any conversation that they had?
 A. No, sir.
 Q. How long were they in each other's company when you saw them?
 A. About five minutes.
 Q. Did he get some beer when he went up there?
 [57] A. Yes.
 Q. How much beer did he get?
 A. I think twelve.
 Q. He got twelve beers?
 A. Yes.
 Q. Regular sized ones or taller ones?
 A. Regular size, the twelve ounce cans.
 Q. You took him back to your house?
 A. Yes.
 Q. Did he give you anything for taking him up to the store, did he—
 A. He just, no more than I drank a couple of beers back.
 Q. You drank a couple of beers on the way back home?
 A. Yes.
 Q. When you got back home what was the next thing that happened that you can recall?
 A. I was outside cutting the grass and cleaning up and taking the leaves and stuff like that. Then Mother came up and he came out of the house and went out and talked to her.
 Q. Were you paying attention to them what they were saying at this time?
 [58] A. No.
 Q. All right.
 A. He got in the car on the other side and it wasn't but a few minutes later that he called over and asked me if I'd go to North Carolina with him. I think he wanted someone to take him to his mother's or wherever he wanted to go. And I said no, I wasn't going nowhere. She said well, I ain't neither then. So I turned around and started doing what I was doing before and then a

little bit later she called back and said she was going to run him up to the diner and that was the last time I saw him or her.

* * *

TESTIMONY OF DAVID A. ANDREWS

[61] *DAVID A. ANDREWS*, introduced on behalf of the Commonwealth, having been previously duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. RUDY:

- Q. State your name?
 A. David A. Andrews, Deputy Sheriff, Chesterfield County.
 Q. Now, did you know the deceased Mary H. Cole?
 A. Yes, sir.
 Q. How did you know her?
 A. She was a cook over here at the jail.
 Q. Was she there when you came to work for the Sheriff's office or were you there when she came there?
 A. She was there when I went to work for the Sheriff's Department.
 Q. Was she still working for the Sheriff's Department on or about the 24th or 25th or 26th of August?
 A. You mean—
 Q. Of last year?
 A. As far as I know, yes, sir.
 [62] Q. Her duties were that of a cook, is that correct?
 A. Yes.
 Q. Now, while you were employed at the Sheriff's Department and while she was employed at the Sheriff's Department was the defendant James A. Jackson incarcerated in the Chesterfield County jail?
 A. Yes, sir.
 Q. Do you know why he was there?
 A. No, sir.
 Q. You do not know why he was there?
 A. No, sir.

Q. Did you ever see the defendant James A. Jackson with Mary Cole?

A. You mean—

Q. At the jail talking to her?

A. Yes.

Q. That type of thing?

A. Yes.

Q. Were you ever privy to hearing anything he was saying or did you just observe?

A. No, sir. Just observed.

Q. Was he a trustee at the jail?

A. Yes.

Q. Did he leave Chesterfield County jail sometime before these events happened that we're here today about?

[63] A. Did he get out of jail?

Q. Yes?

A. Yes, sir.

Q. Do you know how or when it was?

A. No, sir.

Q. You do not remember?

A. No.

Q. Did you have an occasion to see him before this particular occasion after he had gotten out of jail?

A. Yes.

Q. Where did you see him?

A. At the Chesterfield Diner.

Q. Now, how did you happen to see him at the diner?

A. I was riding with Officer Parker and we stopped to eat supper.

Q. Now, are you talking about the night Mrs. Cole disappeared or are you talking about the previous night? That's what I'm asking you about? Previous to that time?

A. It was before.

Q. Before she was killed?

[64] A. Yes, she was there.

Q. Let me rephrase the question. This was on another day that you're talking about I think. Not the day that she, not the night that she disappeared but I'm trying to get at it is, what I'm trying to ask you

is did you ever see him anytime in addition to that time?

A. No, sir.

Q. You did not?

A. No, sir.

Q. But you had an occasion to see him on the 24th of August, 1974, which was a Saturday night? You remember that?

A. Yes.

Q. Now, where did you have an occasion to see him?

A. At the Chesterfield County Diner.

Q. How did you happen to be at that diner?

A. I was riding with Officer Buckner. I rode with Parker one time and this night it was with Officer Buckner.

Q. Were you there when he came in or was he there when you came in?

A. He was there when I got there.

Q. He was there?

A. Yes.

[65] Q. Was he with anybody?

A. Yes.

Q. Who was he with?

A. Mrs. Cole.

Q. Mrs. Cole?

A. Yes.

Q. Were they sitting together?

A. I don't remember, I didn't pay that much attention to him.

Q. When you first paid attention to them who was sitting together? Or were they?

A. They came over to me.

Q. Both of them came up to you?

A. Yes.

Q. Describe the manner in which they came up to you?

A. In an everyday joking manner they came up.

Q. Did Mrs. Cole have anything to say to you or did she show any affection to you or—

A. She came over and I worked with her and she came over and knew who I was.

Q. Was the defendant with her?

A. Yes.

Q. What time was this? Do you remember?

[66] A. Approximately six or seven, between six and seven p.m.

Q. Between six and seven o'clock?

A. Yes.

Q. Now, describe their physical condition relative to the consumption of alcohol at that time as honestly as you can?

A. They had both been drinking. I would say Mr. Jackson had more than Mrs. Cole, it appeared to be that way.

Q. Mr. Jackson was in a pretty rough condition or in pretty rough shape?

A. Yes, sir.

Q. How could you tell that?

A. Just his actions. He did have a little staggering and his eyes were bloodshot.

Q. Did you have any discussion with Mr. Jackson at that time?

A. I don't believe we did much talking.

Q. Did you have any discussion with him outside the diner?

A. Yes, sir.

Q. What discussion did you have with him outside the diner?

A. He showed me a .38 revolver that he had.

[67] Q. Do you remember what it looked like?

A. Stainless, a .38 maybe a model ten or something like that.

Q. Was it rusty?

A. Rusty.

Q. Do you remember—

MR. DANIELS: I thought he said stainless steel?

WITNESS ANDREWS: It appeared to be stainless.

MR. DANIELS: Stainless steel.

WITNESS ANDREWS: I don't know.

BY MR. RUDY:

Q. Do you remember what color the handle had on it?

A. Wood.

Q. What did he tell you about the .38?

A. That it could shoot good.

Q. Did he hand it to you?

A. Yes, sir.

Q. What did you do with it?

A. Gave it back to him.

Q. Where was Mrs. Cole at this time?

[68] A. Standing right there beside us.

Q. Did you see anything of a knife?

A. Yes, sir.

Q. What kind of knife did you see?

A. I don't know for sure, I was in a hurry to get away and get in and eat. She said that she had a knife in the front seat of the car and I looked in and—

Q. I don't mean exactly but can you describe the size of the knife?

A. The standard butcher knife.

Q. It looked like a butcher knife?

A. Yes.

Q. What did she say about the butcher knife?

A. She said she had a butcher knife.

Q. Did you see them when they left?

A. They were getting in the car as I went back into the building.

Q. Who was driving the car?

A. I don't know who was driving but I told Mrs. Cole to drive.

Q. Why did you tell her to drive?

A. Because she didn't look like she had been drinking enough where she couldn't drive them home.

[69] Q. Were you trying to get them out of the diner? Kind of?

A. Yes, sir.

Q. Why was this?

A. Well, I wanted to eat and I didn't feel right with them over there and they had been drinking.

Q. She was a fellow employee of yours?

A. Yes.

Q. You were trying to get her out and get on the road?

A. Yes, sir.

* * *

[70] CROSS-EXAMINATION

BY MR. DANIELS:

* * *

Q. When you first saw Mary Cole and James Jackson in the diner, I believe you testified they were in there before you came?

A. Yes.

Q. Describe to the court if you would, what they were doing? Were they touching one another or either one of them, did either one of them have their arm around each other and that sort of thing?

A. I don't remember.

Q. You did not pay attention?

A. I wanted to be away from them.

Q. You and Officer Buckner and—

A. Officer Richardson, the three of us.

[71] Q. All three were in uniform?

A. Yes. Dave Richardson was with us too.

Q. And I believe you characterized these two people that we talked about as both having been drinking and this man Jackson, James Jackson was in worse shape than she was?

A. Yes.

Q. When was the first time that you ever saw the revolver?

A. I saw it sticking in back of his pants while they were in the diner.

Q. Was it when he bent over that you could see it? Could everybody see it?

A. I could see and I was sitting on the end of the table and the other officers were sitting around the side.

Q. Did they see it?

A. No, sir.

Q. Were they in a position to see?

A. No, sir.

Q. What time did they leave? How long from the time you saw them, I think you testified that it was between six and seven?

A. I would say fifteen or twenty minutes after we got there.

[72] Q. Were they loaded?

A. The defendant was.

Q. Were they joking and sort of boisterous?

A. Jackson was.

Q. When you went out did you ask Jackson to let you see the gun or did he pull it out and show it to you?

A. He pulled it out and showed it to me first.

Q. Did you let him know that you had seen this gun or that you knew he had it?

A. Yes.

Q. What did you ask him in reference to that?

A. I asked him if he'd let me keep it until he sobered up a little bit.

Q. What did he say?

A. He said, she said they were going straight home.

Q. You told her to drive because he was too drunk?

A. Yes.

[73] REDIRECT EXAMINATION

BY MR. RUDY:

Q. Did she say what they were going to do?

A. Yes, said they were going home.

Q. What did he say they were going to do?

A. Would you repeat that?

Q. Well, if Mr. Daniels doesn't object to me asking leading questions, did he indicate that they were going to go home to engage in some form of sexual activity.

A. Yes.

Q. Is that what he told you?

A. Yes, in a round about way. Yes, sir.

Q. Where was Mrs. Cole when he said that?

A. Standing right there.

Q. Right there with him?

A. Yes, sir.

RECROSS-EXAMINATION

BY MR. DANIELS:

Q. What was her reaction?

A. She smiled and left and just laughed.

* * *

TESTIMONY OF MARK E. WILSON

[74] *MARK E. WILSON*, introduced on behalf of the Commonwealth, having been previously duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. RUDY:

Q. State your name?

[75] A. Detective Mark E. Wilson.

Q. Detective Wilson, were you so employed in that capacity on August 24, 1974?

A. Yes.

Q. In that capacity as a detective for Chesterfield County Police Department, did you have an occasion to investigate the facts and circumstances surrounding the indictment that's been read against this defendant today?

A. Yes.

Q. Would you describe for the court, how you first became involved in this case and what caused or what course of action your investigation took from that point on?

A. I received a telephone call at my home and shortly thereafter, around 1:30 a.m. on the morning of August 26, 1974. That call informed me that there had been a body found at Mt. Gilead Church located in Chesterfield County.

* * *

[76] Q. Did you participate in taking some photographs of the body?

A. Yes.

Q. And were there some other pictures that were taken?

A. Yes.

Q. Were these the pictures that were taken?

A. Yes.

Q. I show you a series of five pictures and ask you to look at them and I'll ask you further if they accurately portray the scene where the body was located, at the time you arrived at the scene?

A. That's correct.

Q. Now, I notice you were not the first police officer to arrive there?

[77] A. No.

Q. Now on this picture you will notice that the body clothing or the body was only clothed from the waist up? Is that the way it was found by the first person who arrived there?

A. Yes.

Q. Now, I show you another picture and ask if you can identify that picture?

A. That is located about eight feet from the body where there were six shells, there were six shell casings found there. There was also a beer can in this particular picture and this is a picture of it.

* * *

BY MR. RUDY:

Q. Did you pick the cartridges up?

[78] A. Yes.

Q. I want to show you this plastic container, can you identify it?

A. Yes, that's the shells that I picked up at the scene.

* * *

[80] Q. I show you these three plastic containers and ask you if you can identify those?

A. These are the shell casings found at the residence. This was one that was in the house and I marked that separately. This was at the house. I did not mark identifying marks, I marked the container here.

* * *

[89] Q. Did he make a statement to you at that time?

A. Yes, he did.

Q. All right, do you have that statement reduced to writing?

A. Yes, I do.

Q. Would you read it please sir?

A. Yes. The statement was in the form of questions and answers. First was a question and then the answer. Prior to this time I asked him if he wished to make a statement and he had decided that he would make a statement. Then, this starts the statement. "Jackson, how do you want me to start? Detective Wilson, just go ahead and tell us what happened from the beginning. Jackson, My name is James A. Jackson. [90] I was living with Curtis Cole. On Saturday, August 24th, Mrs. Cole came out to the house about 4:30 p.m. She tooted the horn and I came out to the car. She asked me would I go riding with her. I told her yes. I got in the car and we drove off and went to the Chesterfield Diner. We went in and had a sandwich and a cup of coffee. We walked back out to the car and then we had a few words, you know, arguing, and she tried to stab me with a knife. I pushed her back and hit her. So then I left her and went over to the Bi-Rite Super Market. I called me a taxi. In the meantime she pulled up and asked me to ride down the road with her. I was scared and shakey, which I was. So then, I got back in the car with her and we rode down the road over at the church or what? Detective Ward, Yes, tell where you were. Jackson, Well, we rode over to some church, somewhere. I don't know where we were. So then we got messing around and she said she wanted to have sex with me. I told her no. Then she go mad and tried to stab me again. So I shot in the ground and then she kept right on trying to stab me and so forth. Then I loaded the gun and told her that I didn't want to have nothing to do with her. Then she threw the knife down and tried to take the gun from me. That's where it happened. Detective Ward, What happened? Jackson, That she tried to take the gun and the gun went off. Detective Wilson, Then what happened? Jackson, Then I got scared and [91] and panicky. I got in the car and drove to North Carolina with it. I parked the car over at the parking lot in Fayetteville,

North Carolina. Then, you want me to tell about the boy selling it? Detective Wilson, Yes. Jackson, Then Ernest Davis took the car over to Leo what's that crazy mans' name, Holhouser? Detective Ward, Hockstin or something, I don't know. Detective Wilson, Leo something, I can't think. Jackson, I don't know it then. Took the car over there and told him he'd sell it to him. That's all I know about it. Detective Wilson, What happened to her pocketbook and things of this sort? Jackson, When I left from Virginia, her pocketbook and everything that was in the car was still in the car. I brought it to North Carolina and locked it up at Topeka Heights. Detective Wilson, Was there any money in her pocketbook? Jackson, I do not know. I never did go in it. Detective Wilson, You say you went to Florida after you left North Carolina? Jackson, Yes, sir. Detective Wilson, Then you came back to Fayetteville again? Jackson, Yes, sir."

Q. Did he say how long he was in Florida?

A. I don't recall.

THE COURT: Proceed.

WITNESS WILSON: "Detective Wilson, Is that when the police—Jackson, So that's when the police got me. Detective Ward, How did you go to Florida? Jackson, I went to Florida on a bus. [92] Detective Wilson, You had a \$100 bill in your possession. How did you come by this \$100 bill? Jackson, I borrowed it from Mr. Leo Holshouser, Houserhols, something like that, and told him I would pay him back this Friday. I would send him the money back. Detective Wilson, Did buying the car from this girl have anything to do with this \$100? Jackson, No, sir. It did not. Detective Wilson, Why did this girl think she had a right to sell the car? Jackson, I do not know. Detective Wilson, You know she said you forced her to do it. Is this false? Jackson, Yes, sir it is. Detective Wilson, Is there anything else about this that you can tell us? Jackson, no, sir. That's all I know about it. Detective Wilson, Did she cut you any time that she swung at you with a knife? Jackson, no answer. Detective Wilson, How much did you have to drink that night? Jackson, I drank a fifth of Old Crow, a fifth of

Wild Turkey and a pint of—Detective Wilson, Did she help you drink any of this? Jackson, She drank half of the whiskey with me and we bought two six packs of beer. Detective Wilson, Did you all drink that together too? Jackson, Yes, sir. [93] Detective Wilson, would you describe your condition as being high or drunk or what? Jackson, Well, I wouldn't say I was drunk, but I would say I was pretty high. Detective Wilson, What about her condition. Was she high? Jackson, I'd say she was almost drunk. I don't know what she had been drinking. She smelled like a liquor factory when she came over to the house. Detective Ward, What was the argument you all had at the diner first? When you got out of the car and you called a taxi. What was said at that argument? Jackson, Well, she told me, she said, I want to have sex with you. I told her no. I said I don't want nothing to do with you. She said, well, if I can't have you no other woman is going to have you. So that's when I left. I went over and took a taxi. Detective Ward, How many shots did you fire in the ground before you reloaded up at the church to scare her? Jackson, I shot once and then I saw I couldn't scare her so then I shot five more times and reloaded. Detective Ward, Where did you shoot, what direction did you shoot into the ground? Jackson, I shot north. Detective Ward, Would you show us the spot where you fired these rounds into the ground? Jackson, Yes, sir. [94] Detective Ward, And then you dumped the shells? Jackson, Yes, sir. Detective Ward, And reloaded? Jackson, Yes, sir. Detective Ward, And after that the struggle over the gun took place? Jackson, Yes, sir. Detective Ward, And the gun went off and killed her? Jackson, Yes, sir. Detective Ward, Exactly where was she in relationship to the car when the shot was fired? Jackson, She was on the driver's side of the car. Standing on the outside of the car. Detective Ward, Was the door open or closed? Jackson, It was open. Detective Ward, The door was open? Jackson, Yes, sir. Detective Wilson, Jimmy, you have listened to this tape, now and you've paid attention to it, you understand your rights and is this exactly what happened now? Is this, the death of Mrs. Cole? Jackson,

Sir? Detective Wilson, As far as you know, is this exactly what happened that caused the death of Mrs. Cole? Do you want to change any part of this statement? Jackson, No, sir. Detective Wilson, It's exactly like you want it? Jackson, Yes, sir. It's not like I want it—it's the way it is. That's the truth. Detective Wilson, Jimmy, there is one more question we wanted to ask you. Where did you strike [95] her and what did you strike her with? Jackson, With the butt of the gun in the back of the head. I struck her with the butt of the gun in the back of the head. Detective Wilson, when was this? Jackson, Up there at Chesterfield Diner. Detective Ward, What was her reaction to the blow when you hit her? What happened to her and what did she do? Jackson, She just fell back up against the car and shook her head and came back. Detective Ward, And you took off? Jackson, And I took off. Detective Wilson, We told you that she was shot twice, and she wasn't shot but once. You are sure that no other bullet that you fired struck her? Jackson, No, sir. That was in the opposite way. I didn't mean to shoot her."

* * * *

TESTIMONY OF CLEON C. MAUER

[102] *CLEON C. MAUER*, introduced on behalf of the Commonwealth, having been previously duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. RUDY:

Q. Mr. Mauer, state your name and occupation?

[103] A. Cleon C. Mauer. I am employed with the Bureau of Forensic Science in Richmond, Virginia. I am employed as a firearms identification specialist.

MR. RUDY: Mr. Daniels has agreed to stipulate Mr. Mauer's qualifications.

MR. DANIELS: I've heard Mr. Mauer testify before.

BY MR. RUDY:

Q. There was submitted to you in this case, a series of items for examination?

A. Yes.

Q. One of which was this revolver I believe?

A. Yes.

Q. And these cartridges and I don't want to get you any more confused than I am, about these things, there are six cartridges which have already been identified as having been found at the scene of the crime on the ground. There are three cellophane packages containing cartridges which were found at the residence of a man named Curtis Cole. There's a bullet which was found on the inside of a vehicle which has been identified as that belonging to the deceased. Mary H. Cole. I'd ask you if you have had an occasion to make or to examine these various articles?

[104] A. I have.

Q. Would you tell the court what your examination of these articles revealed?

A. These are—

Q. These are the court numbers now?

A. Yes. This is Exhibit Number 1. I ran an examination of this revolver which is Exhibit Number 1 and I test fired this revolver. I recovered the test fired bullets and the test fired cartridge cases. I made a comparison, a microscopic examination involving the test fired cartridge cases with the fired cartridge cases in Exhibits 9, 10 and 11. The fire cartridge cases in Exhibit 11, and the fired cartridge cases contained in Exhibit 10 and the fired cartridge cases contained in Exhibit Number 12. I also made a comparison, a microscopic examination involving the test fired bullets from Exhibit Number 1 with the fired bullet contained in Exhibit Number 19.

Q. What were the results of your examination and what conclusions did you draw being an expert in this field?

A. Based upon the examination which I conducted, it's my opinion that the cartridge cases contained in Exhibit Number 8, the cartridge cases contained in Ex-

hibit Number 11, the cartridge cases contained in Exhibit Number 10, the cartridge cases contained in Exhibit Number 12, were fired [105] in the revolver which is Exhibit Number 1. Further, that the fired bullets contained in Exhibit Number 19 was fired from the revolver which is Exhibit Number 1.

Q. Now Mr. Mauer, did you make an examination of some articles of clothing? For possible powder burns?

A. I did.

Q. What did your examination reveal sir?

A. Based upon the examination which I conducted, I examined Exhibit Number 14 and I found two holes and I also examined Exhibit Number 15 and I found penetrations in that.

Q. What conclusions were you able to draw insofar as how far the gun was away from the lady when it went off?

A. In my opinion these holes found in Exhibit 14 and 15 were caused by a bullet fired from a firearm having a muzzle distance of approximately one inch from the garment at the instance it was fired.

SUPREME COURT OF THE UNITED STATES

No. 78-5283

JAMES A. JACKSON, PETITIONER

v.

VIRGINIA, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO the United States Court of Appeals for the Fourth Circuit.

ON CONSIDERATION of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

December 4, 1978